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Date of Decision: 10th November 1995

CRIMINAL APPEAL NO. 1079 OF 1984

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA

and

HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? No

2. To be referred to the Reporter or not?

No

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

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Shri P.S. Chapaneri, Addl. Public Prosecutor, for the Appellant

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Shri J.H. Tholani, Advocate, for the Respondent (amicus curie)

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.

(Date: 10th November 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of acquittal passed by the learned District Judge at Rajkot on 6th June 1984 in Sessions Case No. 10 of 1984 is under challenge in this appeal preferred by the State of Gujarat.

2. The facts giving rise to this appeal move in a narrow compass. The incident happened on 22nd November 1983 at about 5 a.m. The victim of the incident was a lady by the name of

Shobhna. She was a married woman. It is the case of the prosecution that she was pregnant at the relevant time and her mother-in-law doubted the paternity of the child in womb. It is the case of the prosecution that on the previous day the mother-in-law (the accused for convenience) had taunted her daughter-in-law that the child was conceived through a person other than her husband. The daughter-in-law (the deceased for convenience) is reported to have stated thereafter that she was beaten by her mother-in-law. The deceased woke up the next morning at 5 a.m. She lit the hearth. It is the case of the prosecution that the pan containing kerosene was nearby. The mother-in-law also is reported to have woken up. She was disturbed at seeing the face of the deceased in the wee hours. She is reported to have pushed the deceased on the hearth. In the process kerosene from the pan spilled on the floor. The clothes of the deceased thereupon got fire. She was then pushed by her mother-in-law and in the result she fell on her father-in-law sleeping nearby. Later on the deceased was carried to hospital. In the meantime, a message was conveyed to the police station that the deceased tried to commit suicide. The deceased is stated to have reported to the doctor at the time of her admission as an indoor patient in hospital that she received injuries of burns on account of a push given by her mother-in-law on the lit hearth. The necessary treatment was given to her. In the meantime, the investigation was taken up. The complaint of the incident was recorded from the deceased herself. In her complaint she is reported to have pointed an accusing finger against her mother-in-law for the incident in question. The executive magistrate in charge was informed for recording her dying declaration. Accordingly it was recorded. On completion of investigation, a charge-sheet against the accused was submitted to the court of the Chief Judicial Magistrate at Rajkot. Since the case was triable by the Court of Sessions, it was committed to the Sessions Court at Rajkot. It came to be registered as Sessions Case No. 10 of 1984. The charge against the accused was framed on 9th April 1984. The accused did not plead guilty to the charge. She was thereupon tried. After recording evidence and recording the further statement of the accused under sec. 313 of the Code of Criminal Procedure, 1973, by his judgment and order delivered on 6th June 1984 in the aforesaid sessions case, the learned Sessions Judge acquitted the accused of the charge levelled against her. The aggrieved State has thereupon invoked the appellate jurisdiction of this court by means of this appeal.

3. The trump card stated to be in the hands of the prosecution is the dying declaration recorded by the Executive Magistrate at Exh. 11 on the record of the case. The Executive Magistrate recording the dying declaration is examined at Exh. 9 on the record of the case. It transpires from his evidence that, when he reached the hospital for recording the dying

declaration, the doctor in charge was in the operation theatre. He was summoned therefrom for the purpose of certifying that the deceased was in a fit state of consciousness to give her dying declaration. It transpires from the evidence of the Executive Magistrate at Exh. 9 that, when he reached the room where the deceased was kept, he found quite a few persons surrounding the patient. The Executive Magistrate at Exh. 9 has admitted that, despite that position, he did not choose to ascertain from the deceased whether or not she was tutored by anyone found around her at the relevant time. That apart, there appears to be one inherent improbability in the version unfolded at trial through the Executive Magistrate at Exh. 9 with respect to the dying declaration at Exh. 11 on the record of the case. It transpires from the evidence of the Executive Magistrate at Exh. 9 that the doctor in charge was in the operation theatre at the relevant time. The said doctor, named, Dr. Buch, has been examined at Exh. 32 on the record of the case. In his cross-examination he has admitted to the effect that he was in the operation theatre at the relevant time. The prosecution has not chosen to lead evidence why Dr. Buch was in the operation theatre at the relevant time. Whether or not he was therein for performance of some surgery on some patient is nobody's case. If he was performing surgery on some patient, he would not come out of the operation theatre in the midst of such surgery. It might be contrary to the professional ethics pertaining to the medical professional. Dr. Buch in his oral testimony at Exh. 32 has nowhere stated why he was in the operation theatre and whether or not he was busy in performing any surgery on some patient. It would be difficult to accept the submission urged before us by learned Additional Public Prosecutor Shri Chapaneri for the appellant that Dr. Buch might have gone to the operation theatre just to verify whether or not the equipments for surgery were properly kept. It is incumbent on the prosecution to lead cogent and convincing evidence in that regard from Dr. Buch himself in his oral testimony at Exh. 32. For aught one knows, he might be actually busy in performing surgery on some patient. If that was so, it would be highly improbable that he would come out of the operation theatre and remain all throughout the dying declaration came to be recorded. The Executive Magistrate in his oral testimony at Exh. 9 has deposed that the recording of the dying declaration lasted for nearly 20 minutes. No surgeon worth the name would leave his patient in the lurch in the operation theatre if he has already started performing the surgery. Even if only anaesthesia is given to the patient towards preparation for surgery, no doctor would ordinarily come out of the operation theatre even at that stage. This unusual conduct on the part of Dr. Buch has not been explained by or on behalf of the prosecution in any manner, much less in a satisfactory manner. The dying declaration at Exh. 11 on the record of the case deserves to be discarded on this ground alone.

4. It is borne out from the evidence on record that the parents of the deceased were informed of the incident at about 7 a.m. on that very day. They are reported to have rushed to the hospital and reached thereat at about 7.30 a.m. The complaint is at Exh. 37 on the record of the case. It appears to have been recorded around 8 a.m. At that stage the parents of the deceased had already seen her. It is not uncommon in our society that the mother-in-law and the daughter-in-law are found at daggers drawn. The society regards them as inimical to each other right from day one. The parents of the deceased would therefore be inclined to see that her mother-in-law is implicated. Tutoring of the deceased in that regard cannot altogether be ruled out. The complaint at Exh. 37 and the dying declaration at Exh. 11 can be said to be the result of such tutoring. In that view of the matter, it would be hazardous to rely on either the complaint at Exh. 37 or the dying declaration at Exh. 11 for the purposes of fastening the criminal liability to the accused in this case though we are aware that the reliable and trustworthy dying declaration can be made the sole basis of conviction. Even at the cost of repetition, we are inclined to reiterate that both the complaint at Exh. 37 and the dying declaration at Exh. 11 are found to be tainted with unreliability and untrustworthiness.

5. It may not be out of place to refer to the information conveyed to the police station as found recorded in the station diary an extract of which is at Exh. 20 on the record of the case. It has been recorded therein that the deceased had attempted to commit suicide. It transpires therefrom that this information was received from the duty Head Constable stationed at the hospital. This piece of evidence is capable of ruling out the possibility of homicidal death of the deceased.

6. Since the trump card in the hands of the prosecution is the dying declaration of the deceased at Exh. 11 on the record of the case and since we have found it to be devoid of reliability and trustworthiness, we are of the opinion that the prosecution has failed to establish its case beyond reasonable doubt at trial. We therefore find no reason to interfere with the impugned judgment and order of acquittal.

7. Before parting we should like to record a note of appreciation for learned Advocate Shri J.S. Tholani. At our instance he volunteered to assist this court on behalf of the accused. It may be noted that the accused has not chosen to appear through any advocate for the purpose of this appeal. No advocate has come to be appointed by the Registry to appear for the accused. Shri Tholani was sitting in the court-room and at our instance he volunteered to render assistance instantaneously. We appreciate his gesture to get ready with

the matter in no time.

8. In the result, this appeal fails. It is hereby dismissed. The bail bonds furnished by the accused are cancelled.